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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10 ESPERANZA MARCHBANKS, ) No. SA CV 13-1778-AS  
11 )  
12 Plaintiff, )  
13 v. ) MEMORANDUM AND OPINION  
14 )  
15 CAROLYN W. COLVIN, )  
16 Acting Commissioner of the )  
17 Social Security Administration, )  
18 Defendant. )  
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PROCEEDINGS

21 Plaintiff Esperanza Marchbanks ("Plaintiff"), asserts disability  
22 since March 7, 2007, based on alleged physical impairments. (A.R.  
23 186-192, 224). The Administrative Law Judge ("ALJ") examined the  
24 Certified Administrative Record ("A.R.") and heard testimony from  
25 Plaintiff and a vocational expert ("VE") on July 20, 2011, and April  
26 4, 2012. (A.R. 73-131). On May 1, 2012, the ALJ denied Plaintiff  
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1 benefits in a written decision. (A.R. 20-42). On July 15, 2013, the  
2 Appeals Council denied review. (A.R. 5-10).

3 On November 19, 2013, Plaintiff filed a Complaint, pursuant to  
4 42 U.S.C. § 405(g), alleging that the Social Security Administration  
5 erred in denying her disability benefits (Docket Entry No. 3). On  
6 April 15, 2014, Defendant filed an Answer to the Complaint (Docket  
7 Entry No. 13), and the Certified Administrative Record (Docket Entry  
8 No. 14). The parties have consented to proceed before a United  
9 States Magistrate Judge (Docket Entry Nos. 9, 10). On October 23,  
10 2014, the parties filed a Joint Stipulation ("Joint Stip.") setting  
11 forth their respective positions on Plaintiff's claim (Docket Entry  
12 No. 22).

#### 13 14 **RELEVANT ADMINISTRATIVE FINDINGS**

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16 Based on a review of the record and testimony from a VE, the ALJ  
17 found, at step five, that Plaintiff did not have the residual  
18 functional capacity ("RFC") to return to her past relevant work as a  
19 home health aide, a certified nursing assistant, or a  
20 cashier/checker. (A.R. 36). The ALJ did find, however, that  
21 Plaintiff could work as a "bakery worker conveyer line" or a "counter  
22 clerk photo finishing." (A.R. 37). The VE, relying on the  
23 Dictionary of Occupational Titles ("DOT"), testified that these jobs  
24 existed in significant numbers in both the local and national  
25 economies. (A.R. 37, 101).

## STANDARD OF REVIEW

This court reviews the Administration's decisions to determine if: (1) the Administration's findings are supported by substantial evidence; and (2) the Administration used proper legal standards. Smolen v. Chatter, 80 F.3d 1273, 1279 (9th Cir. 1996). "[I]f evidence can reasonably support either affirming or reversing the ALJ's conclusion, [a] court may not substitute its judgment for that of the ALJ." Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1196 (9th Cir. 2004).

## DISCUSSION

Plaintiff contends that the ALJ erred in finding that a substantial number of "bakery worker conveyer line" and "counter clerk photo finishing" jobs exist nationally. (Joint Stip. 4-11). In support of this claim, Plaintiff claims that statistics found in the Occupational Outlook Handbook ("OOH") conflict greatly with those found in the DOT, on which the VE relied. However, Plaintiff, who was represented by counsel at the administrative hearing, did not raise this issue before the ALJ or before the Appeals Council. Therefore, this Court must determine whether or not it can consider the new evidence for the first time on appeal.

"[W]hen claimants are represented by counsel, they must raise all issues and evidence at their administrative hearings in order to preserve them on appeal." Meanel v. Apfel, 172 F.3d 1111, 1115 (9th Cir. 1999) (affirming decision of the ALJ because plaintiff had

1 waived the issues related to new statistical evidence that was  
2 introduced for the first time on appeal). This is true in the case  
3 of new statistical evidence, as "[t]he ALJ, rather than this Court,  
4 [is] in the optimal position to resolve the conflict between [a  
5 claimant's] new evidence and the statistical evidence provided by the  
6 VE." Id. Here, the Court's consideration of the new evidence would  
7 "deprive[] the Commissioner of an opportunity to weigh and evaluate  
8 that evidence."<sup>1</sup> Silveira v. Apfel, 204 F.3d 1257, 1260 fn. 8 (9th  
9 Cir. 2000). The Court finds that because Plaintiff was represented  
10 by counsel at her hearing before the ALJ and failed to raise this  
11 issue at the hearing, seek reconsideration of the ALJ's decision, or  
12 raise this issue before the Appeals Council, she has waived the issue  
13 on appeal. As a result, this Court's determination of whether the  
14 ALJ erred is limited to a review of the record at the time of the  
15 administrative hearing, and the additional evidence submitted to the  
16 Appeals Council.<sup>2</sup>

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If an issue is "a pure question of law and the Commissioner will not  
be unfairly prejudiced by [Plaintiff's] failure to raise the issue  
below," it may be raised for the first time on appeal. Silveira v.  
Apfel, 204 F.3d at 1260 fn. 8 (citing United States v. Thornburg, 82  
F.3d 886, 890 (9th Cir. 1996)). This principal does not apply here  
because the new statistical *evidence* that Plaintiff raises on appeal is  
a question of fact.

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The additional evidence submitted to the Appeals Council consisted of  
a single brief that does not mention the issue that Plaintiff now raises  
before this Court. (A.R. 296-300).

1 **CONCLUSION**

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3 The only issue that Plaintiff has raised is one which has been  
4 waived because it was not raised below. (Joint Stip. 4). Both  
5 parties have stipulated to the accuracy of the ALJ's medical and non-  
6 medical evidentiary findings. (Id.) As a result, the decision of  
7 the ALJ need not be examined, as there is no contention that the ALJ  
8 erred in any of her other findings.

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10 **ORDER**

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12 For all of the forgoing reasons, the decision of the  
13 Administrative Law Judge is affirmed.

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15 LET JUDGMENT BE ENTERED ACCORDINGLY.

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17 Dated: November 4, 2014

18 /s/  
19 ALKA SAGAR  
20 UNITED STATES MAGISTRATE JUDGE  
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